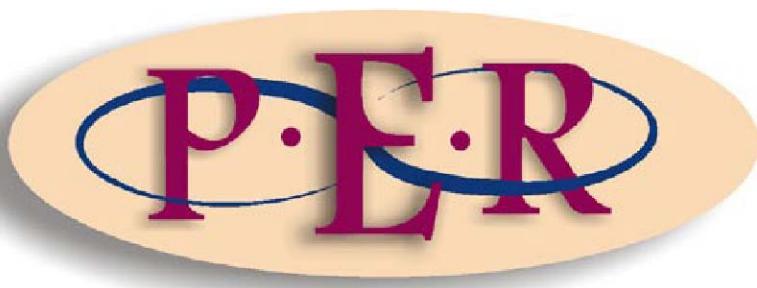


**PUBLIC PARTICIPATION, GOOD ENVIRONMENTAL GOVERNANCE
AND FULFILMENT OF ENVIRONMENTAL RIGHTS**

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PUBLIC PARTICIPATION, GOOD ENVIRONMENTAL GOVERNANCE AND FULFILMENT OF ENVIRONMENTAL RIGHTS

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Men being by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and unite into a community for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties and a greater security against any that are not of it.¹

Good governance depends on mutual trust and reciprocal relations between government and people. This must be based on the fulfilment of constitutional, legislative and executive obligations and the acceptance of authority, responsibility, transparency and accountability.²

1 Introduction

Increased awareness of the notion of human rights and the inter-disciplinary analyses and interpretation of these globally accompanies a particular focus on environmental rights. Since the 1970s, global environmental calamities and augmented consciousness of the state of the environment resulted in a particular awareness of peoples' environmental rights. Today, these rights feature in a number of state constitutions and international law instruments. Environmental rights generally require respect and protection by state

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1 With reference to the statement of Locke in 1960, Lane *Constitutions and Political Theory* 37.

2 *White Paper on Integrated Pollution and Waste Management for South Africa 2000* 70; Zillman Introduction to Public Participation.

governments as well as positive action on the part of organs of state towards its fulfilment.

Some fundamental rights may be worthless when not guaranteeing a means of formal participation by right-holders in their implementation.³ Public participation in environmental decision-making relates to the notion of participatory democracy and environmental justice and often comes to the fore in academic analyses of environmental rights. It has been observed that a ‘participation explosion’ has been occurring throughout the world over the last four decades and that by whatever name (public participation, citizen involvement, indigenous peoples’ rights, local community consultation, et cetera), the idea that the governed should engage in their own governance is “gaining ground and rapidly expanding in both law and practice”.⁴

This article succinctly, albeit critically, assesses with reference to some international developments the role that public participation is expected to play in state governments’ fulfilment of citizens’ environmental rights. Based on a survey of literature and jurisprudence, the article considers substantive environmental rights as human rights and the notion of public participation generally. It also puts forward some ideas on the relation between public participation and the fulfilment of environmental rights and how this may feed into good environmental governance. The article does not aim to contribute to the discourse on good governance or good environmental governance *per se*. Instead, it introduces the presumed role of public participation processes in an environmental rights context what may be but a facet of good governance and/or good environmental governance. The article is limited to the attention generally devoted to public participation processes in an environmental rights

3 Van Reenen 1997 *SAJELP* 272. According to Verschuuren and Ebbesson’s account, Habermas’ views regulated public participation and transparency as essential for the legitimacy of law and this implies that procedure must not only provide for public participation, but also give equal opportunities to the parties involved to influence one another and to limit authorities’ discretion when making a final decision. See Verschuuren 2005 *Yearbook of European Environmental Law* 31 n 18 and 19.

4 Pring and Noé Emerging International Law 11.

context – analysis of its real-life successes or failures falls beyond the scope of this contribution. Where applicable, the South African context is employed to illustrate and reinforce observations and/or viewpoints.

2 Environmental rights as human rights

To critique on the role of public participation in the fulfilment of environmental rights, it is important to address a number of foundational questions. What are environmental rights and where do we find it? What is embraced by the ‘environment’ as contained in the notion of ‘environmental rights’? The answers to these questions depend on context and location but it is possible to derive from international jurisprudence and writings a generically applicable response.

At the superficial level and in a collective sense environmental rights refer to the basic rights contained in the environmental clauses of instruments such as the International Bill of Rights,⁵ regional human rights instruments,⁶ some international and regional environmental law instruments⁷ and domestic constitutions.⁸ Environmental rights can be defined further as:

Basic rights to a qualified environment beneficial to human life and well-being that belong to members of existing and future generations. Environmental rights are rights of action and rights of recipience that consider: the state of the environment; the relation and interaction between people and their environment; as well as the dependency of human life on the natural resource base.⁹

5 The International Bill of Human Rights comprises of the Universal Declaration of Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966 (entered into force in 1976), the International Covenant on Civil and Political Rights of 1966 (entered into force in 1976) and its two Optional Protocols of 1966 and 1989. See OHCHR <http://www.ohchr.org/english/law/index.htm> 15 May.

6 Such as the African Charter on Human and Peoples' Rights of 1981.

7 Such as the Rio Declaration on the Environment of 1992.

8 Note that this essay does not concern itself with the international theoretical discourse on whether or not a universal environmental human right exists or should be established. A number of scholarly works on the environment and human rights concerns this theoretical discourse. See, *ia*, Schrijver and Weiss (eds) *International Law* 382.

9 Dowrick (ed) *Human Rights Problems* 26. Birnie and Boyle *International Law and the Environment* 254 state that the “... the most far-reaching case for environmental rights comes in the form of claims to a decent, healthy or viable environment to a substantive

Environmental rights are human rights that epitomise in holistic fashion and in legal terms the integrated interrelationship between humans and the environment and the claim of people to an environment of a particular quality.¹⁰ The scope of these rights generally extends beyond peoples' natural environment also to include aspects such as cultural heritage, human habitat and health.¹¹ With little exception environmental rights constitute both rights of action and rights of recipience. Whereas rights of action emphasise what people as right-holders are entitled to do, rights of recipience emphasise what people as right-holders are entitled to expect or receive. As far as this article is concerned with the role of public participation in the fulfilment of environmental rights, particular attention is paid to environmental rights as autonomous substantive rights of recipience that may require public involvement in their implementation.

3 The notion of public participation

environmental right which involves the promotion of a certain level of environmental quality". Note also that the recognition of environmental rights as rights of recipience necessitates the identification of duty holders who have the obligation to either fulfil environmental rights or enable the fulfilment thereof. See Sengupta 2002 *Human Rights Quarterly* 843.

- 10 Note that environmental rights often show rather insignificant differences in meaning, scope and application – especially environmental rights contained in domestic constitutions. The meaning of 'environment' in different environmental rights often also differs. Whilst s 24 of the *Constitution of the Republic of South Africa*, 1996 provides for the right to "an environment that is not detrimental to health or well-being", the *Constitution of Namibia*, 1990 in art 95(1) refers to the right of people to have policies implemented aimed at the maintenance of ecosystems, essential ecological processes and biological diversity and the utilisation of living resources on a sustainable basis. Art 19 of the *Constitution of Chile*, 1980, for example, provides for a right to live in an environment free of contamination. See, for the formulation of and discussion on the environmental rights in the constitutions of, *ia*, India, the Philippines, Colombia, the United States, Peru, Portugal, South Korea, Honduras, Uganda, Bangladesh, Spain and the Netherlands, Hill *et al* 2004 *Georgetown Int'l Envt'l LR* 382-391, Symonides 1992 *International Journal for Legal Information* 27-28 and Nickel 1992 *Yale JIL* 284.
- 11 Déjeant-Pons and Pallemaerts *Human Rights and the Environment* 19 remark that: "(i)n its most basic form, the right to environment could be equated with the existence of an environment fit to sustain human life..." and that the right implies a level of environmental quality which is sufficient to ensure not only bare survival, but also the satisfaction of basic human needs when read with the right to dignity.

Leaving environmental rights beside for a moment, the questions arise as to what is meant by public participation generally, and why public participation is important in the processes of decision-making, often by democratically elected governors and developers at different levels. Picolotti¹² defines participation as the real involvement of all social actors in social and political decision-making processes that potentially affect the communities in which they live and work. Public participation also has been described as:

All interaction between government and civil society... including the process by which government and civil society open dialogue, establish partnerships, share information, and otherwise interact to design, implement, and evaluate development policies, projects and programs.¹³

Public participation, in laymen's terms, boils down to the communication (through different means) of views/concerns on public issues by those concerned and/or affected.¹⁴ Public participation of communities in decision-making is regarded also as a spin-off to decentralisation as a contemporary trend in local governance.¹⁵ The modalities of participation are determined in different countries by its particular laws and public authorities as well as by traditions and culture. This means that in similar cases different patterns may be followed and different instruments, tools, procedures or mechanisms may be used to facilitate public participation. In South Africa, for example, explicit provision is made for public participation by means of, *inter alia*, ward committees in local government, public meetings, public comment following press notices and integrated development planning in a range of different laws and policies discussed below.

12 Picolotti and Taillant (eds) *Linking Human Rights and the Environment* 50.

13 With reference to the Organisation of American States' Public Participation Strategy see Pring and Noé *supra* n 4 at 16.

14 For a historical overview of public participation, see Pring and Noé *supra* n 4 at 17-21.

15 UN Habitat Report *State of the Worlds' Cities* 2006/2007 168.

Wilkinson identifies three general functional categories of public participation: education/information, review/reaction and interaction/dialogue.¹⁶ The author argues that each function is an integral part of planning and decision-making processes. Various participation mechanisms can be classified as performing one of these three functions, but the degree of participation involved in each mechanism is a function of the nature of both the mechanism itself and the given situation. Accordingly, no single participation mechanism can constitute a 'public participation programme' nor will any combination of mechanisms be appropriate in every case. Wilkinson holds that the trend in developing public participation progress should be toward a variety of mechanisms to perform each of the three functions and flexibility to meet the needs of a given situation.¹⁷

Representative democracy in itself is a form of public participation where decision-making officials or politicians are chosen by those who have been democratically elected. Still sometimes, more direct participation of citizens to supplement representative democracy is required.¹⁸ It is, for example, not a given that a decision-maker will be familiar under all circumstances with the socio-economic needs of all community members. Also, what should be avoided at all cost is that participation becomes limited at the important issue-formulation stage of decision-making processes. In many instances, the only information submitted to the public is a superficial outline of the final form of some project or development as per prior agreement by government bodies, developers and other decision-makers.¹⁹ This phenomenon misconstrues the idea of public participation and should be prevented in order for public participation to be a truly significant exercise from as early as issue-identification for decision-making.

16 Wilkinson 1976 *Natural Resource Journal* 119.

17 *Id* at 119.

18 Refer to, *ia*, Scroth 1978-1979 *Forum* 357.

19 Wilkinson *supra* n 16 at 119.

A general lacuna is that often laws and policies of different countries incorporate and emphasise the need for public participation without an exposé of meaningful tools/methods or processes for the practical achievement of such participation. This implies that although the notion of public participation is widely advocated, few real-life guidelines exist on how to achieve community involvement. Some other generic dilemmas accompany public participation – especially with regard to the implementation thereof. Public participation is often viewed as hampering decision-making progress and as preventing swiftness in processes aimed at social and economic development.²⁰ This is not unthinkable when taking into account peoples' different value and cultural systems, different development priorities and needs as well as different levels of education. Another challenge lies in the fact that uneducated people or people with *mala fide* intentions often partake in public participation processes, which could affect the merits of their input. The effectiveness of public participation hence requires innovation and creativity on the part of governments' decision-makers.

4 Implicit linkages between public participation and fulfilment of environmental rights

The importance of the role of public participation in democratic governance generally is not difficult to comprehend. It is, however, important to understand how and why public participation links with the fulfilment of environmental rights and with environmental governance. First of all, states are accountable to the international community in terms of international law, and to their own citizens in terms of international law and domestic constitutions. States have an

20 Verschuuren with reference to Ebbesson remarks that participation is costly, time-consuming and obstructive and could to some extent even repress differences. See Verschuuren *supra* n 3 at 40 n 48, and for several criticisms against public participation in environmental decision-making, Pring and Noé *supra* n 4 at 25-26 and Barton Underlying Concepts 106-110.

internationally recognised obligation to “respect, protect and fulfil” their citizens’ human rights, inclusive of environmental rights.²¹

No single international directory or *ipso iure* guideline exists of ways in which environmental rights should be implemented by states. It is up to each country to seek and develop appropriate means and methods to this effect.²² This is no straightforward mandate. However, the Limburg Principles on the Implementation of the International Convention on Social, Cultural and Economic Rights of 1987 (the Limburg Principles),²³ the Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights of 1997 (the Maastricht Guidelines)²⁴ and international law jurisprudence are aids that assist in clarifying the meaning and structural parts of the fulfilment of socio-economic rights, such as substantive environmental rights, generally.

From the Limburg Principles it is derived that the fulfilment of environmental rights requires, *inter alia*: states’ use of all appropriate means to this effect (including legislative, administrative, judicial, economic, social and educational measures);²⁵ states’ equitable and effective use of available resources and the provision of access thereto;²⁶ avoidance of discrimination²⁷ and the furthering

21 See principle 3 of the Limburg Principles on the Implementation of the ICESCR of 1987, guideline 6 of the Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights of 1997 and Dankwa *et al* 1998 *Human Rights Quarterly* 705 on the “three-level ‘typology’ of obligations”. See also Eide 1999 *NIHR Human Rights Report* 141.

22 Principle 6 of the Limburg Principles *supra* n 20 states that there is no single road to the full realisation of socio-economic rights.

23 UN doc E/CN.4/1987/17.

24 The Maastricht Guidelines were developed on the occasion of the 10th anniversary of the Limburg Principles during 1997 to elaborate on the latter. See Anon 1998 *Human Rights Quarterly* 691-701. Note that although the Maastricht Guidelines relate primarily to the ICESCR, it is according to principle 5 thereof equally relevant to the interpretation and application of other norms of international and domestic law in the field of economic, social and cultural rights. Eide remarks that although the Maastricht Guidelines are not legally binding, they carry considerable weight in any debate on the understanding and determination of violations of economic, social and cultural rights and in providing remedies thereto at all levels. See also Eide *supra* n 21 at 141.

25 The idea is emphasised that legislative measures alone are not sufficient for fulfilment of socio-economic rights. See principles 17 and 18.

26 Principle 27. Note that in the context of the ICESCR, principle 28 determines that in the use of the available resources due priority shall be given to the realisation of the rights recognised in the ICESCR, mindful of the need to assure for everyone the satisfaction of subsistence requirements as well as the provision of essential services.

of well-being of people as a whole.²⁸ States will violate environmental rights (fail to fulfil) when, for example: states refrain from taking steps that are expressly required in terms of such rights; fail to remove obstacles to the fulfilment of environmental rights; fail to implement the right if it is required to be implemented immediately; willfully fail to meet a generally accepted international minimum standard of achievement which is within their powers to meet, or deliberately and unjustifiably retards or halts the progressive realisation of these rights.²⁹ The Maastricht Guidelines take the ideas around fulfilment slightly further. The fulfilment of environmental rights would require, *inter alia*, that: states take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of environmental rights and that states comply with their obligations of conduct and obligations of result that require the achievement of specific targets to satisfy a detailed substantive standard.³⁰ The Maastricht Guidelines also introduce states' 'margin of discretion' in selecting the means for implementing their rights-obligations. As an aid, universal minimum standards may be derived from state practice and the application of legal norms to concrete cases and situations by international bodies as well as domestic courts.³¹ Considering for a moment what the latter international instruments require of governments in practice, it seems as if fulfilment of environmental rights inevitably will require public participation in decisions related to issues covered by these rights.

Judiciaries and adjudicating bodies often also strengthen the law by reflecting on veiled meanings of the law and rights and by construing directives. In the absence to date of an international environmental court, existing international tribunals and domestic courts remain to strengthen and interpret environmental rights. Recent years have marked a number of steering decisions by, *inter alia*, the United Nations Human Rights Committee, the European Court of Human

27 Principles 35-41, 45.

28 Principle 52.

29 Principle 72.

30 Guideline 7.

31 Guideline 8.

Rights, the European Commission of Human Rights and the African Commission on Human and Peoples' Rights. Four of the most pertinent cases which addressed the duties of governments arising from environmental rights or other rights implying environmental protection, are the *Social and Economic Rights Action Centre for Economic and Social Rights (SERAC) v Nigeria*, *African Commission on Human and Peoples' Rights* (2001), the *López Ostra v Spain* (1994), *Guerra and Others v Italy* (1998) and *Hatton and other v UK* (2001) decisions.³² As far as the fulfilment of the environmental right and other related rights are concerned, international case-law to date highlighted amongst other aspects the need for public participation in environmental decision-making.

5 Explicit linkages between public participation and fulfilment of environmental rights

Public participation is two-sided: process-related where it is viewed as an end in itself³³ and substantive where it contributes to some further important outcomes/achievements.³⁴ Participation in environmental decision-making is an effective tool to establish environmental priorities, offer solutions to environmental challenges and prepare, execute and apply the most accurate

32 *López Ostra v Spain* (1994) decided by the European Court of Human Rights (Chamber), Strasbourg. In the *López Ostra v Spain* decision it was, *ia*, decided that the Spanish government failed to strike a fair balance between the interest of the town's economic well-being in having a waste-treatment plant and the applicant's respect for her home and family life in terms of art 8 of the European Convention on Human Rights which were interpreted to embrace the right to a healthy environment free from pollution and environmental nuisance. In this case, the Spanish government's inaction resulted in non-fulfilment and caused the breach of the applicant's human rights. Similarly, in the case of *Guerra and Others v Italy* (1998) decided by the European Court of Human Rights, Strasbourg, the Italian government was found in contravention of the applicant's right to private life in terms of art 8 of the European Convention on Human Rights where it failed to provide timely and essential environmental information on a hazardous chemical factory, enabling participants to assess the risk of living near this factory.

33 It can, for example: raise public awareness and educate the public, give the public an opportunity to express its concerns, allow for representation of diverse interests and can facilitate the accountability of governors.

34 Pring and Noé *supra* n 4 at 22.

decision possible.³⁵ Public participation in environmental decision-making (and hence the furthering of environmental rights) is regarded as important for different reasons:

- Affected persons likely to be otherwise unrepresented in, for example, environmental assessment and decision-making processes are provided an opportunity to present their views;
- Communities may provide useful additional information to decision-makers – especially when cultural, social or environmental values are involved that cannot be quantified easily;
- Accountability of political and administrative decision-makers is likely to be reinforced if environmentally relevant processes are open to public view. Openness puts pressure on administrators to follow, for example, a required procedure in all cases;
- Without integrating the viewpoints of citizens, environmental policy runs the risk of being delayed early in the implementation phase. Public participation enhances community ownership of decisions and resultant outcomes because of the community being part of the wider decision-making process;³⁶
- Stakeholder engagement may result in partnerships or alliances between interested parties and local government;³⁷ and
- Public confidence in the reviewers and decision-makers is enhanced since citizens clearly can see in every case that all environmentally-relevant issues have been fully and carefully considered.

35 Picolotti and Taillant *supra* n 12 at 50-51. Picolloti outlines four basic modalities of public participation, namely: informative participation, consultive participation, participation in decision-making and participation in management. The four conditions to ensure the enjoyment of the right to participate are said to be: access to information, autonomy, political willingness and stakeholder identification. See further Picolotti and Taillant *supra* n 12 at 52-53 and Verschuuren *supra* n 3 at 29-33. Participation may also be crucial for environmental risk identification in policy and law-making processes. See Page and Proops (eds) *Environmental Thought* 27.

36 Note of the benefits of public participation listed by Mokale and Scheepers *Introduction* 27.

37 See, *ia*, Evans *et al* *Governing Sustainable Cities* 111.

Motivated by the above, a number of international law instruments draw explicit linkages between the achievement of environmental law objectives and public participation.³⁸ The *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)* of 1998, in particular, aims to reinforce the need for public participation in environmental decision-making.³⁹ Among other things it requires of states to implement public involvement in decisions on an array of specific development activities. The *Rio Declaration on Environment and Development* of 1992 solemnly adopted principles on public participation⁴⁰ and these are endorsed by Agenda 21.⁴¹ In fact, the effective implementation of Agenda 21's objectives, policies and mechanisms requires 'genuine involvement' of all social groups.⁴² It is reiterated in Agenda 21 that there is a need for "new forms of participation" and the

... need of individuals, groups and organisations to participate in environmental impact assessment procedures and to know about and participate in decisions.⁴³

Participation also closely relates to the notion of participatory democracy without which, according to the *United Nations (Ksentini) Special Rapporteur's Report on Human Rights and the Environment* of 1994⁴⁴ and the *Draft Declaration of Principles on Human Rights and the Environment* of 1994 (annexed to the former report), the notion of sustainable development is without

38 For an extensive outline of public participation requirements in international environmental law documents, refer to Pring and Noé *supra* n 4 at 26-50.

39 See also Pring and Noé *supra* n 4 at 49.

40 See principle 10 on the participation of citizens, principle 20 on the participation of women and principle 22 on the participation of indigenous people and their communities.

41 See ch 23 of Agenda 21 stating that "(o)ne of the fundamental requisites for the achievement of sustainable development is broad public participation in decision-making".

42 These groups include women, youth, indigenous people, local communities, NGOs, workers and trade unions, business and industry as well as the scientific and technological community. See ch 20-22, 25-27 and 29-32 of Agenda 21. See also Picolotti and Taillant *supra* n 12 at 50.

43 See Agenda 21 ch 23 and in particular par 23.1 and 23.2. See also par 71 of the Ksentini Report.

44 Report of the UN, Economic and Social Council Commission on Human Rights Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

substance.⁴⁵ International claims have been made that one of the fundamental prerequisites for the achievement of sustainable development (which is at the core of most environmental rights) is broad public participation in decision-making processes.⁴⁶ It may be derived that environmental decision-making is expected to operate within a theoretical framework concerned with constitutional principles of fairness (inclusive of equality) and legitimacy.⁴⁷ Verschuuren argues together with others that the right to participate in environmental decision-making is a procedural right that “can be seen as part of the fundamental right to environmental protection”.⁴⁸

The explicit link between public participation and the fulfilment of environmental rights cannot be reviewed without mentioning the role of environmental information. Environmental information relates to the idea of *publicare* and accordingly complements and supports public participation.⁴⁹ From international law instruments and jurisprudence on environmental rights it is evident that environmental rights cannot be fulfilled by a state in the absence of the gathering and sharing of environmental information.⁵⁰ Emanating from the right to the environment, the Aarhus Convention clearly outlines the need for and the content of the right to have access to environmental information. The Rio Declaration and chapter 23 of Agenda 21 furthermore explicitly call for access to information on the environment and development⁵¹ whilst principle 15 of the

45 See par 70 of the Ksentini Report as well as principle 18 of the Draft Principles which propose that: “(a)ll persons have the right to active, free and meaningful participation in planning and decision-making activities and processes that may have an impact on the environment and development. This includes the right to prior assessment of the environmental, developmental and human rights consequences of proposed actions”.

46 See eg principle 6 of the United Nations World Commission on Environment and Development (WCED) Report on Sustainable Development (the Brundtland Report) of 1987 and principle 13(b) of the Earth Charter of 2000.

47 Part III of the Draft Principles recognises the importance of democratic/procedural rights to realise substantive environmental rights. See further Simpson and Jackson 1997 *Environmental and Planning Law Journal* 274-275.

48 Verschuuren *supra* n 3 at 29.

49 *Publicare* means ‘making known’. For the relationship between environmental information and environmental decision-making, see *ia*, Gavouneli 2000 *Tulane Envtl LJ* 307.

50 See, *ia*, Birnie and Boyle *supra* n 9 at 261-265, Verschuuren *supra* n 3 and Gavouneli *supra* n 49.

51 See principle 10 of the Rio Declaration, which may be viewed as an international simulation of the procedural aspects that accompany the fulfilment of environmental rights.

Draft Declaration of Principles on Human Rights and the Environment proposes that: “(a)ll persons have the right to information concerning the environment.”⁵²

The catchphrases seem to be collection, dissemination and access whilst the right to environmental information may be said also to establish a subsidiary right to the autonomous environmental right that should be afforded to all people. Public participation increases the accountability of the decision-maker in a way that complements the accountability that can be imposed by courts, by a minister or even by periodic government elections. It acts as a check on the bureaucracy and possible temptation to disregard democratic values (also those underlying environmental rights).⁵³

Environmental information sharing by the state depends on the availability of information, hence a need for research and data-collection. It is imperative for a state, via suitable organs of state and/or other institutions, to collect up-to-date and scientifically reliable information on, *inter alia*, the state of the environment, environmental impacts, conservation, pollution levels, discharges and emissions and other environmentally relevant activities.⁵⁴ As a pillar for the fulfilment of environmental rights and as a complementary element of public participation, it is arguably expected of governments to disseminate environmental information on a regular basis amongst all stakeholders.⁵⁵ Environmental information could for example also embrace information on permit conditions and regulatory standards.⁵⁶ Such information may not be filtered only to reveal “what is good for people to know” and should be factually correct and valid. It is argued that environmental information should be non-discriminatory at all times and that it is crucial for well-informed public

See also Glazewski *Environmental Law in South Africa* 95, principle 6 of the Brundtland Report and principle 13(a) of the Earth Charter.

52 This includes information, howsoever compiled, on actions or courses of conduct that may affect the environment and information necessary to enable effective public participation in environmental decision-making. The information shall be timely, clear, understandable and available.

53 Barton *supra* n 20 at 105.

54 Refer to, *ia*, Casey *et al* *Evolving Role* 563-564.

55 See Fabra 2002 *Yearbook of Human Rights and Environment* 208.

56 Refer to Casey *et al* *supra* n 54 at 563-564.

participation in environmental matters and the development of environmental laws, policy and programmes.

6 Applying theory to the South African law framework

Without commenting on the level of implementation performance, it now suffices to describe succinctly how the South African legislature in recent years went about incorporating public participation in the laws regulating environmental decision-making.⁵⁷ The body of applicable laws mainly developed in response to democratic change in 1994 and the adoption of the *Constitution of the Republic of South Africa, 1996* (the Constitution). The South African law framework serves to show what an important role public participation legally is required to play as a result of a Bill of Rights that, *inter alia*, provides for an enforceable substantive environmental right.

6.1 The legislative framework

Section 24 of the Constitution contains the environmental right of South Africa's citizens and states that:

Everyone has the right:

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

57 According to the 2006 DEAT *South Africa Environmental Outlook* xix, it is encouraging that civil society and the private sector are increasing their participation in environmental management and accountability, and environmental information is more widely available to the public, but public participation processes still need to be improved.

Section 24(b) requires positive action on the part of government by means of reasonable legislative and other measures, which arguably implies a need for public participation in environmental decision-making at all levels. The other constitutional rights that support the latter idea includes the right to access to information (section 32) and the right to just administrative action (section 33). The Constitution furthermore provides in section 152(1)(e) that one of the objectives of local government is to encourage the involvement of communities and community organisations in the matters of local government. Sections 195(e) and (g) state that as one of the basic values and principles governing public administration the public must be encouraged to participate in policy-making and that transparency must be fostered by providing the public with timely, accessible and accurate information.

The constitutional framework is further supported by, *inter alia*, the *White Paper on Integrated Pollution and Waste Management of South Africa* of 2000 (White Paper on IPWM), the *Draft National Policy Framework for Public Participation* of 2005 (Draft National Policy Framework), the *National Environmental Management Act 107 of 1998* (the NEMA), the *National Environmental Management: Waste Management Bill* of 2007 as well as the *Promotion of Administrative Justice Act 3 of 2000* (PAJA) and the *Promotion of Access to Information Act 2 of 2000* (PAIA). In South Africa, particular emphasis is placed on the role of local authorities or municipalities in facilitating public participation in decision-making generally. As a result, the *Local Government: Municipal Systems Act 32 of 2000* (the Systems Act) and the *Local Government: Municipal Structures Act 117 of 1998* (the Structures Act) also serve to strengthen the constitutional framework.

The White Paper on IPWM provides that public participation will be expanded using consensus-based approaches and negotiated rule-making.⁵⁸ Responding to public needs and encouraging public participation in environmental

58 White Paper on IPWM 60.

governance by providing mutual exchange of views and concerns between government and people are listed in the White Paper as key components of good governance and as a distinctive part of the obligation of government to effect the section 24 environmental right in the Constitution.⁵⁹

In the Draft National Policy Framework, the South African government attempted to avoid mere establishment of a vague and generally applicable legal call for public participation. The Draft National Policy Framework outlines a number of public participation principles with accompanying examples of instruments and methods intended for implementation by local government:

| Principles | Proposed examples of instruments and methods |
|--------------------------------------|---|
| Inclusivity | Identification and recognition of existing social networks, structures, organisations, social clubs and institutions and employment of these as vehicles for communication. |
| Diversity | Ensure that different interest groups including women, the disabled and youth groups are part of governance structures. |
| Building community capacity | Solicit funding from external sources to train ward committees on their role in development. Embarking on consumer education on all aspects of local governance including the functions and responsibilities of municipality and municipal structures. |
| Transparency | Engendering trust in the community by opening council meetings in the public and encouraging attendance. |
| Flexibility | Being flexible in terms of time, language and approaches to public meetings. |
| Accessibility | Conducting public meetings in local language. |
| Accountability | Ensuring report-backs to community forums or ward committees at least on a quarterly basis. |
| Trust, commitment and respect | Ensuring that the purpose of the process is explained adequately as well as how it will develop. |
| Integration | Integrating ward planning with the IDP process. Including user committees in mainstream services such as school governing bodies. |

59 White Paper on IPWM 70.

The NEMA is South Africa's principal environmental management framework law that, *inter alia*, contains a number of environmental principles. Section 2(4)(f) provides that the participation of all interested and affected parties in environmental governance must be promoted and that all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation and that participation by vulnerable and disadvantaged persons must be ensured. Section 2(4)(g) supports the latter provision by stating that decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.

To become the latest addition to South Africa's framework of sectoral environmental management acts, the *National Environmental Management: Waste Management Bill* of 2007 makes explicit albeit fragmented provision for public participation. The Bill provides, *inter alia*, that in instances where a license application is submitted to the DEAT by for example a mining company, the latter must take appropriate steps to bring the application to the attention of interested persons and the public.⁶⁰ The contents of any industry waste management plan should, for example, also be brought to the attention of the public for open comment.⁶¹ The public participation tools mentioned in the Bill may however be a bit archaic and exclusive. Provision is mainly made for notices in one or more newspapers hence, disregarding the fact that many people in South Africa are still illiterate. The option is, however, at the disposal of applicants to take additional 'appropriate' steps for the purpose of public participation.⁶² Any comments submitted in respect of a waste management authorisation application must be considered and a copy of all comments must be submitted to the authorities together with the application documents.⁶³ Accordingly, quite laudably so, the Waste Management Bill explicitly provides

60 S 52(2).

61 S 37.

62 S 52(2).

63 S 37(3).

for the outcomes of public participation processes and the content of existing waste management plans to form part of the decision-making process in license application procedures.⁶⁴ It is furthermore required of applicants to notify any persons who have objected to the application for a waste management authorisation, of the decision and the reasons for the decision.⁶⁵

The Bill also makes provision for consultive processes with the public prior to the exercising of some powers by the Minister of DEAT or a MEC in terms of the Bill.⁶⁶

The main objectives of the PAJA are to promote an efficient public administration and good governance in South Africa and to give effect to the right of everybody to administrative action (inclusive of environmental decision-making) that is lawful, reasonable and procedurally fair.⁶⁷ The PAIA aims to foster a culture of transparency and accountability in public and private bodies by giving effect to the right to access to information and actively promote a society in which the people of South Africa have effective access to information to enable them to exercise and protect all of their rights more fully – inclusive of the environmental right.⁶⁸

The Systems Act is a local government framework law which explicitly states that the legal nature of a municipality entails that a municipality consists of political and administrative structures as well as of the community.⁶⁹ Sections 4(2)(b)-(d) provide that the council of a municipality has the duty to, *inter alia*: encourage the involvement of the local community; strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner; and to consult the local community in this regard. In terms of section 4(2)(i) it also has the duty to promote a safe and healthy environment. Section 5 of the Systems Act is rather extensive and

64 S 52(5), 53(h), 54(2)(a) and (f) and 59(3).

65 S 54(3).

66 S 77 and 78.

67 Preamble to the PAJA.

68 Preamble to the PAIA.

69 S 2(b)(ii) of the Systems Act.

provides that members of the local community have the right to contribute to decision-making processes and to submit written or oral recommendations, representations and complaints to the municipality. Citizens also have the right to prompt responses to their written or oral communications, including complaints, to the municipality and to be informed of decisions affecting their rights, property and reasonable expectations. The local community also has the right to regular disclosure of the state of affairs of the municipality. Section 16 outlines a number of aspects for the development of a culture of community participation some of which include that a municipality must encourage and create conditions for the local community to participate in the affairs of the municipality, and that it should contribute to building the capacity of the local community to enable it to participate. It is, furthermore, stated that participation by the local community in the affairs of the municipality must take place through political structures for participation as well as other appropriate mechanisms, processes and procedures.⁷⁰ For this purpose a municipality must provide for, *inter alia*, the receipt, processing and consideration of petitions and complaints lodged by members of the local community, notification and public comment procedures, when appropriate, public meetings and hearings by the municipality, when appropriate, consultative sessions with locally recognised community organisations and, where appropriate, traditional authorities. The act provides further that in the case of the latter a municipality must take into account the special needs of people who cannot read or write, people with disabilities, women and other disadvantaged groups.

The Structures Act is another local government framework law which provides that the object of a so-called ward committee is to enhance participatory democracy in local government (section 72).

6.2 *Related jurisprudence*

70 S 17 of the Systems Act.

At least two environmentally relevant decisions of South African courts to date addressed issues of public participation. In *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156 (C) the Cape Provincial Division of the High Court reiterated the close nexus between just administrative action and the participation of interested and affected parties during all stages of, *inter alia*, environmental decision-making by authorities. This case concerned the Director-General of the Department of Environmental Affairs and Tourism's (DEAT) approval of an authorisation that enabled the national electricity provider to construct a demonstrator model pebble bed nuclear reactor next to an existing nuclear plant near Cape Town. The court found this decision of the DEAT to be fatally flawed and set the decision aside since the DEAT omitted to comply with the procedures for just administrative action when its decision was made. The court ruled that the matter had to be remitted to the Director-General and directed the latter to afford the applicant and other interested parties an opportunity to submit representations to him and that he then consider those submissions before making a decision anew on the application for authorisation.⁷¹

In the case of *Petro Props (Pty) Ltd v Barlow and Another* 2006 (5) SA 160 (W) the court dismissed the application for an interdict to prevent a public campaign against the construction of a fuel service station and convenience store on an ecologically sensitive wetland. Essentially the case involved the weighing up of the section 25 constitutional property right of the applicant against the section 16 constitutional right to freedom of expression of the respondent. The court found that the interests of the respondent and her associates had been selfless and that their *modus operandi* had been entirely peaceful and geared towards balanced public participation.⁷² Quite laudably so, the court made it clear that no decision-making power or process in terms of the *Environment Conservation Act* 73 of 1989 could be immune from public debate or the lodging of

71 Par [70] and [82] at 175B/C and 178E.

72 Par [55] at 183I-184B.

representations⁷³ and that it wanted to prevent a situation that would deter people with environmental objections from stepping forward as active citizens.⁷⁴

6.3 *Observations*

Positively viewed, the South African law framework serves to show how an environmental right and the implied right of all to participate in environmental decision-making may be strengthened by subsequent legal developments – causing an amplified ripple-effect. In South Africa, particular emphasis is placed on the role of local government in furthering public participation as is evident from the Systems Act and the Structures Act. In too little instances, provision is made for the socio-economic challenges that may hamper the optimisation of public participation. Little provision is made for, *inter alia*, public participation tools that will suit the conditions in rural areas or for innovative means to get illiterate people or highly skilled institutions such as tertiary education centra involved. There is also no attempt to estimate in certain cases who the expected interested and affected parties and hence, the target group for public participation will be. Furthermore, there is not much in existing law and policy which recognise and elaborate on the symbiotic relationship between environmental information, environmental education and participation in environmental decision-making. Case law served to show that the judiciary is dedicated to strengthen public participation in environmental decision-making at all levels as it links with constitutionally entrenched just administrative action and the constitutional right to freedom of expression. In a more negative sense, however, the provisions for public participation in the enforceable legal instruments (accordingly not the Draft National Policy Framework) prove itself to be ambiguous on appropriate or required tools, mechanisms and procedures. The potential of the latter *lacunae*, however, lies in the fact that the legal framework allows for variation and flexibility in facilitating public participation in environmental decision-making in different parts of, and cultures

73 Par [73.2]-[73.3] at 189B-F.

74 Par [59]-[60] at 185C-E.

in South Africa. It is in the final instance imagined that the *lacunae* and tribulations in South Africa, still characterise several countries and legal regimes.

7 Conclusive observations: public participation and good environmental governance

It is agreed in full with Picolotti whom holds that –

(t)he advancement of the relationship between human rights and the environment would enable the incorporation of human rights principles within an environmental scope such as anti-discrimination standards, the need for social participation, protection of vulnerable groups, etc.⁷⁵

This article assessed in an introductory fashion, the role which public participation is expected to play in state governments' fulfilment of citizens' environmental rights. Based on the scope of environmental rights generally and the meaning of 'fulfilment' of such rights, one may conclude that enablement and facilitation of public participation in environmental decision-making have a key part to play in governments' fulfilment of environmental rights. The exact parameters for the fulfilment of a specific country's environmental right will depend on the wording and scope of application of such a right. Environmental rights, however, generally direct towards the right of citizens to the maintenance of an environment of a specified quality – implying, *inter alia*, environmental standards, environmental issue-identification, environmental impact assessment and of course, continuous responsible environmental decision-making or environmental governance. The quality of the environment that people are legally entitled to will barely, if ever, be outlined in scientific jargon in a constitutional and/or human rights document itself. The acceptable environmental quality and methods for the maintenance thereof, should be

75 Picolotti Human Rights 603.

established by means of collaborative assessment, agreement and decision-making by politicians, scientists in collaboration with the people exposed to and living in the environment concerned.

Public participation is synonymous with stakeholder dialogue. Public participation in environmental decision-making is about linking the citizen to environmental governance and it provides the means through which environmental rights are exercised. It is agreed with Pring and Noé that environmental problems cannot be solved effectively by government alone. Protecting the environment requires the joint effort of governments and the public⁷⁶ and is ultimately reliant on good environmental governance. The latter should be understood to be

...not only ridding societies of corruption, but also giving people the rights, the means, and the capacity to participate in the decisions that affect their lives and to hold their governments accountable for what they do. It means fair and just democratic governance.⁷⁷

It is proposed for public participation to go beyond information-feedback and consultation towards, for example, open planning, citizen monitoring and citizen assistance in environmental inspections.⁷⁸ Revision of legislation merely would be the first step in formulating a broad policy for constructive public participation to the advancement of, for example, the fulfilment of environmental rights. Without a generically applicable policy, governments experimenting with public participation cannot do so responsibly and constructively. Experiments with public participation that are undertaken in isolation, on an *ad hoc* basis, on the spur of the moment, or under temporary political pressure, will confuse both the public and decision-makers and will offer inconclusive evidence as to their success or failure and will remain open to accusations of manipulation/imposition.⁷⁹ Unless a broad national policy is applicable to all departments and

76 Pring and Noé *supra* n 4 at 75.

77 Zaelke What Reason Demands 29.

78 Wilkinson *supra* n 16 at 121 and Lucas 1976 *Natural Resources Journal* 81 and Casey et al *supra* n 54 at 566-568.

79 Wilkinson *supra* n 16 at 133.

spheres of government lack of general policy guidelines may result in inconsistent programs, each with its own structure and purpose.⁸⁰ A generic policy must go beyond provisions for and idealistic statements about the desirability of public participation as is, for example, the case in existing South African framework law. The type of policy suggested should ultimately be drafted in such a manner so as to provide for more concrete measures and/or tools to facilitate the fulfilment of, *inter alia*, peoples' environmental rights claims. It should also absorb the fact that drawing on the resources of citizens can furthermore enrich and strengthen a country's environmental law compliance and enforcement regime where public participation has been encouraged in the creation of environmental laws and regulations.⁸¹

The remarks of Locke and Zillman at the very beginning of this article hold true – questions concerning public participation and environmental justice are important issues in emancipatory thought and in the strengthening of environmental rights the world over. This article illuminated some deficiencies with reference to the South African context and perhaps in so doing, generated some new or additional research questions and fields of enquiry. It left unattended, for example, the role of public participation in the finance of development projects, alternative environmental law enforcement regimes and international corporate standards. It is possible to conclude that there is almost universal agreement that public participation has the potential to improve accountability for the effective management of resources and the development of appropriate means to protect the environment of communities of people, which ultimately is what we have environmental rights for today. What remains in need is extensive exploration of a hybrid of effective tools to unlock and fully realise this potential.

80 *Id.*

81 Casey et al *supra* n 54 at 560.

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United Nations (Ksentini) Special Rapporteur's Report on Human Rigths and the Environment 1994
United Nations World Commission on Environment and Development Report on Sustainable Development 1987
Universal Declaration of Human Rights 1948

List of abbreviations

| | |
|--------|---|
| ch | chapter(s) |
| DEAT | Department of Environmental Affairs and Tourism |
| ia | inter alia |
| ICSCER | International Covenant on Social, Cultural and Economic Rights |
| IPWM | Integrated Pollution and Waste Management |
| NGO | Non-governmental organisation(s) |
| OHCHR | Office of the United Nations High Commissioner for Human Rights |

| | |
|-------|---|
| PAIA | Promotion of Access to Information Act |
| PAJA | Promotion of Access to Just Administrative |
| par | paragraph(s) |
| s | section(s) |
| sch | schedule(s) |
| SERAC | Social and Economic Rights Action Centre for Economic and Social Rights |
| WCED | World Commission on Environment and Development |